Louisiana Law Review

Volume 24 | Number 3
April 1964

Torts - Liability for Damages Caused By Infants

George A. Kimball Jr.

tion seems equally clear. The Negotiable Instruments Law requires that a promissory note contain a promise to pay *another*.[17] Obviously an unendorsed instrument payable to "myself" does not meet this requisite.[18] Furthermore, the negative tenor of the concluding sentence of R.S. 7:184 following an extensive definition of a negotiable promissory note[19] would seem to imply that such incomplete instruments are to be excluded from the definition of a promissory note. The court was correct, therefore, in treating the instrument as null and requiring that suit to recover be brought within the three-year prescription period on money lent.

Stanford O. Bardwell, Jr.

TORTS — LIABILITY FOR DAMAGES CAUSED BY INFANTS

Suit was brought against a father to recover for damages done by his six-year-old child to a neighbor's home and its furnishings. The plaintiff predicated liability on Louisiana Civil Code article 2318, which makes the father liable for damages caused by his children without regard to his personal fault. The district court maintained defendant's exception of no cause of action and the court of appeal affirmed. *Held*, a petition alleging property damage deliberately, wantonly, and maliciously inflicted by a child of six, but failing to allege the personal fault of the parent, does not state a cause of action against the father under article 2318, since a six-year-old child is legally incapable of fault. *Scottish Union and National Ins. Co. v. Prange*, 154 So. 2d 623 (La. App. 4th Cir. 1963).

Neither in France nor at common law is the parent vicariously liable for the torts of his children simply by virtue of the familial relationship.[1] The principal basis of parental liability

Ross, 170 So. 400 (La. App. Orl. Cir. 1936); Prestenbach v. Mansur, 14 La. App. 429, 129 So. 445 (1930); Bank of St. Martinville v. Duchamp, 6 La. App. 562 (La. App. 1st Cir. 1927).

17. See note 3 *supra*. See also Navin v. McCarty, 240 Mass. 447, 1344 N.E. 232 (1922); First Nat'l Bank v. Payne, 111 Mo. 291, 20 S.W. 41 (1892).

18. Under elementary obligations principles, it is difficult to see how an instrument whose promissor and promissee are the same party could be a contract of any kind, much less a promissory note.

19. See note 3 *supra*.

1. French authorities: FRENCH CIVIL CODE art. 1384; 1 MAZEAUD, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSIBILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE nos 732-734, 764 (5th ed. 1957) [hereinafter cited as MAZEAUD]; 2

in both legal systems is the parent's own negligence;[2] consequently it is immaterial whether the child is at fault or mature enough to be chargeable with tortious conduct.[3] In common law jurisdictions the parent may incur liability if he has instructed or encouraged the child to commit the act,[4] or has failed to supervise the child adequately,[5] or has negligently entrusted a dangerous instrumentality to his child,[6] or has failed to warn a third person of a dangerous disposition in the child of which he had actual or presumptive knowledge.[7] Closer living conditions and more extensive use of automobiles by minors have given rise to the problem of allocating the risk of damages caused by children in cases where the parent's negligence would be difficult or impossible to establish. Several jurisdictions have responded with jurisprudential[8] and statutory[9] rules im-

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PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 909 (1959) [hereinafter cited as PLANIOL]. Common law authorities: PROSSER, TORTS § 102 (2d ed. 1955) [hereinafter cited as PROSSER]. See generally 1 HARPER & JAMES, TORTS § 8.13 (1956) [hereinafter cited as HARPER & JAMES]. A parent may, however, be vicariously liable on the basis on an agency relationship with the child or the "family purpose" doctrine. 2 HARPER & JAMES §§ 26.12, 26.15; PROSSER, §§ 66, 102. See note 9 *infra* and accompanying text.

2. FRENCH CIVIL CODE art. 1384; 1 MAZEAUD n°s 732-734, 764; PROSSER § 102.

3. Though at common law this conclusion never seems to have been in doubt, it was debated in France. 1 MAZEAUD n° 763. The child's maturity and the nature of his act may nevertheless be relevant in determining the parent's fault and thus indirectly affect his liability. *Id.* n° 764.

4. *E.g.*, Condel v. Savo, 350 Pa. 350, 39 A.2d 51 (1944); Trahan v. Smith, 239 S.W. 345 (Tex. Civ. App. 1922).

5. *E.g.*, Kuchlik v. Feuer, 239 App. Div. 338, 267 N.Y. Supp. 256 (1933); Johnson v. Glidden, 11 S.D. 237, 76 N.W. 933 (1898); Norton v. Payne, 154 Wash. 241, 281 Pac. 991 (1929).

6. *E.g.*, Dickens v. Barnham, 69 Colo. 349, 194 Pac. 356 (1920); Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013 (1901). Also, articles not inherently dangerous but likely to be put to a dangerous use by the child: *e.g.*, Davis v. Gavales, 37 Ga. App. 242, 139 S.E. 577 (1927) (bicycle); Zuckerberg v. Munzer, 277 App. Div. 1061, 100 N.Y.S.2d 910 (1950) (baseball bat).

7. *E.g.*, Ellis v. D'Angelo, 116 Cal. App. 2d 310, 243 P.2d 675 (1953); Zuckerberg v. Munzer, 277 App. Div. 1061, 100 N.Y.S.2d 910 (1950).

8. Under the "family purpose" doctrine, adopted in about half the states, the owner of an automobile is liable for the negligence of a member of the family driving the car for his own pleasure or convenience, or on a family mission, with the express or implied consent of the owner. The doctrine is justified on a fictitious agency relationship, the consenting owner supposedly making the family purpose his "business" and the user his agent or servant. *E.g.*, Benton v. Regeser, 20 Ariz. 273, 179 Pac. 966 (1919); Dribble v. Wolff, 135 Conn. 428, 65 A.2d 479 (1949); Griffin v. Russell, 144 Ga. 275, 87 S.E. 10 (1915); Stevens v. Van Deusen, 56 N.M. 128, 241 P.2d 331 (1952); King v. Smythe, 140 Tenn. 217, 204 S.W. 396 (1918); Allison v. Bartelt, 121 Wash. 418, 209 Pac. 863 (1922). See generally HARPER & JAMES §§ 8.13, 26.15; PROSSER §§ 66, 102; Lattin, *Vicarious Liability and the Family Automobile*, 26 MICH. L. REV. 846 (1928).

9. *E.g.*, CALIF. VEHICLE CODE § 402; IOWA CODE § 5037.09 (1939); MICH. COMP. LAWS § 256.29 (1948); N.Y. VEHICLE AND TRAFFIC LAW § 59. These are "permissive user" statutes which make the owner of an automobile liable for the

posing no-fault liability on the parent in certain limited circumstances. These rules evidence a policy determination that the expense of damages characteristically caused by children should be a family responsibility.

In France a parent is responsible for the acts of his children which cause damage to a third person unless the parent can show he could not have prevented the act.[10] Since in France the parent's fault is presumed and must be rebutted to avoid liability,[11] the burden placed on the parent is more severe than at common law.

Louisiana has not been faced with the problem of devising new bases of parental liability to meet changing social needs. Article 2318[12] of the Louisiana Civil Code provides that the

negligence of a person operating the vehicle with his consent, including the owner's minor child. A more recent development is enactment of statutes imposing strict liability in certain limited amounts on a parent for property damage done intentionally by minor children. *E.g.*, CAL. CIV. CODE § 1714.1; NEB. REV. STAT. § 43-801 (1951).

10. FRENCH CIVIL CODE art. 1384 (Wright's Transl. 1908): ". . . A father and (after the death of the husband) the mother are responsible for the damage caused by their children under age who live with them. . . . This responsibility exists unless the father, mother . . . prove that they could not prevent the act in respect of which the liability arises." See generally 1 MAZEAUD nos 732-779.

11. 1 MAZEAUD n° 766. The basis of liability under article 1384 and the presumption of the parent's fault is the civilian doctrine of paternal authority over the child's conduct which is accompanied by a duty to third parties to prevent harmful acts of the child. *Id.* n° 734. The purpose of the presumption is to facilitate recovery by reversing the burden of proof. *Id.* n° 766. As a general rule the parent may relieve himself of liability by showing he has supervised the child as a reasonable parent should and that the fault of the child was not due to a poor upbringing or to a fault of character. *Id.* n° 778. See generally *id.* nos 766-779.

12. LA. CIVIL CODE art. 2318 (1870): "The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons." The basis for this provision is paternal authority to control the child's conduct. *Id.* arts. 216-218, 237; *e.g.*, Succession of Burns, 199 La. 1081, 7 So. 2d 359 (1942); Mullins v. Blaise, 37 La. Ann. 92 (1885); Coats v. Roberts, 35 La. Ann. 891 (1883); Watkins v. Cupit, 130 So. 2d 720 (La. App. 1st Cir. 1961); Jackson v. Ratliff, 84 So. 2d 103 (La. App. Orl. Cir. 1956). Thus when paternal authority is interrupted by the child's mandatory participation in civil or military services the parent is not liable. Coats v. Roberts, *supra* (son on *posse comitatus*); Simmons v. Sorenson, 71 So. 2d 377 (La. App. 1st Cir. 1954) (son in army, though home on furlough). Likewise, a parent is relieved of liability after his paternal authority has been divested by judicial decree. Jackson v. Ratliff, 84 So. 2d 103 (La. App. Orl. Cir. 1956) (divorce, custody granted to grandmother). In respect to the requirement that the child must be residing with his parents, it has been held common residency is not a necessary allegation in a suit against the parent. Toca v. Rojas, 152 La. 317, 93 So. 108 (1922); McInnis v. Terry, 121 So. 2d 329 (La. App. 1st Cir. 1960). As long as paternal authority is not interrupted, the residence of the child is considered that of the parent, though in fact they live apart. Toca v. Rojas, *supra*; Watkins v. Cupit, 130 So. 2d 720 (La. App. 1st Cir. 1961). A parent is liable for torts of adopted as well as natural children. McInnis v. Terry, *supra*.

father is liable for the damages caused by his minor or unemancipated children. Observing the omission from this article of the clause contained in the corresponding French Civil Code provision[13] whereby the parent can escape liability by showing he could not have prevented the child's act, the Louisiana courts have consistently held under article 2318 that the parent is liable regardless of the absence of fault on his part.[14] Though there have been some indications to the contrary,[15] the prevailing view is that the parent's liability under article 2318 is vicarious[16] and that a parent will not be liable unless the child is at fault[17] and, a fortiori, old enough to be capable of fault.[18] This conclusion has been reached by construing article 2318 in light of article 237 which provides the parent is liable for the *delicts* and *quasi-delicts* of his children.[19]

It is the general rule that a minor is liable for his torts both

13. FRENCH CIVIL CODE art. 1384 (quoted note 10, *supra*). The discrepancy between the French and Louisiana provisions was noted in Johnson v. Butterworth, 180 La. 586, 591-98, 157 So. 121, 122-25 (1934) and Mullins v. Blaise, 37 La. Ann. 92, 94 (1885). It is possible the omission of the parent's "escape clause" from the Louisiana provision was an unintended result of legislative revision. See Chief Justice O'Niell's discussion in Johnson v. Butterworth, *supra*.

14. *E.g.*, Johnson v. Butterworth, 180 La. 586, 157 So. 121 (1934); Rush v. Town of Farmerville, 156 La. 857, 101 So. 243 (1924); Toca v. Rojas, 152 La. 317, 93 So. 209 (1922); Sutton v. Champagne, 141 La. 469, 75 So. 209 (1917); Mullins v. Blaise, 37 La. Ann. 92 (1885); Marrioneaux v. Brugier, 35 La. Ann. 13 (1883); Honeycutt v. Carver, 25 So. 2d 99 (La. App. 1st Cir. 1946); Phillips v. D'Amico, 21 So. 2d 748 (La. App. Orl. Cir. 1945). Liability may also be predicated on the parent's personal fault under LA. CIVIL CODE art. 2315 (1870). Johnson v. Butterworth, *supra* at 611, 157 So. at 129; *cf.* Briggs v. Iowa Mut. Ins. Co., 150 So. 2d 905 (La. App. 1st Cir. 1963); Phillips v. D'Amico, *supra*.

15. See Succession of Burns, 199 La. 1081, 7 So. 2d 359 (1942); Mullins v. Blaise, 37 La. Ann. 92, 93 (1885); Cleaveland v. Mayo, 19 La. 414, 417 (1841); Watkins v. Cupit, 130 So. 2d 720, 723 (La. App. 1st Cir. 1961); Kern v. Knight, 127 So. 133, 137 (La. App. 1st Cir. 1930). In these cases the courts have espoused the view that liability under article 2318 is based on a presumed fault of the parent in failing to supervise the child adequately. Under this interpretation it would be theoretically consistent to hold the parent liable regardless of the child's lack of maturity or legal fault. See Mullins v. Blaise, *supra* at 93. However, it need not result that the parent be liable for *all* damages caused by the child, since it would seem such a presumption of fault should only apply when the act of the child is such that a reasonable parent would have tried to prevent it.

16. Johnson v. Butterworth, 180 La. 586, 157 So. 121 (1934); Toca v. Rojas, 152 La. 317, 93 So. 108 (1922); Gaspard v. Grain Dealers Mut. Ins. Co., 131 So. 2d 831 (La. App. 3d Cir. 1961); Hay v. American Motorist Ins. Co., 66 So. 2d 371 (La. App. 2d Cir. 1953); Honeycutt v. Carver, 25 So. 2d 99 (La. App. 1st Cir. 1946); Phillips v. D'Amico, 21 So. 2d 748 (La. App. Orl. Cir. 1945); Gott v. Scott, 199 So. 460 (La. App. 2d Cir. 1940); Savoie v. Walker, 183 So. 530 (La. App. 1st Cir. 1938); Cornelius v. Montegut, 8 Orl. App. 358 (La. App. Orl. Cir. 1911).

17. See cases cited note 16 *supra*.

18. Johnson v. Butterworth, 180 La. 586, 157 So. 121 (1934).

19. *Id.* at 611, 157 So. at 129; Toca v. Rojas, 152 La. 317, 327, 93 So. 108, 111 (1922); Gott v. Scott, 199 So. 460, 464 (La. App. 2d Cir. 1940).

at common law[20] and in France,[21] but in both legal systems exceptions have been created to mitigate an infant's liability. At common law the standard of care employed to determine a child's negligence generally fluctuates according to his age and maturity,[22] so that a very young child may be relieved of liability where an adult would be liable, simply by finding no negligence.[23] A minority of jurisdictions refuse to apply the fluctuating criterion to a child under seven, holding such child legally incapable of negligence altogether.[24] A child may be relieved of liability for an intentional tort if it is found his tender age and lack of maturity negate the presence of the particular mental state necessary for the tort in question.[25] In France a child

20. Jennings v. Rundall, 8 T.R. 335, 101 Eng. Rep. 419 (1799); Ellis v. D'Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (1953); Watson v. Wrightson, 26 Ind. App. 437, 59 N.E. 1064 (1901); Patterson v. Kasper, 182 Mich, 281, 148 N.W. 690 (1914); Churchill v. White, 58 Neb. 22, 78 N.W. 369 (1899); Chasser v. Hutton, 139 Misc. 623, 248 N.Y. Supp. 136 (1931); Vermont Accept. Corp. v. Wiltshire, 103 Vt. 219, 153 Atl. 199 (1931); Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955); Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911). See generally 2 HARPER & JAMES § 8.13; PROSSER § 109.

21. FRENCH CIVIL CODE art. 1310; 1 MAZEAUD n^{os} 449, 462; PLANIOL no. 879.

22. Kitsap County Transp. Co. v. Harvey, 15 F.2d 166 (9th Cir. 1927); Hoyt v. Rosenberg, 80 Cal. App. 2d 500, 182 P.2d 234 (1947); Ackerman v. Advance Petroleum Transp., 304 Mich. 96, 7 N.W.2d 235 (1942); Johnson v. St. Paul City Ry., 67 Minn. 260, 69 N.W. 900 (1897); Charbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457 (1931); Karr v. McNeil, 92 Ohio App. 458, 110 N.E.2d 714 (1952); Gulf, C. & S.F. R.R. v. McWhirter, 77 Tex. 356, 14 S.W. 26 (1890); Thomas v. Oregon Short Line R.R., 47 Utah 394, 154 Pac. 777 (1916); Quinn v. Ross Motor Car Co., 157 Wis. 543, 147 N.W. 1000 (1914); 2 HARPER & JAMES §§ 8.13, at 658, 16.8; PROSSER § 31, at 127-28; RESTATEMENT, TORTS § 283, comment *e*, § 464 (1939). See generally Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924); Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618 (1927).

23. *E.g.*, Hoyt v. Rosenberg, 80 Cal. App. 2d 500, 182 P.2d 234 (1947) (child not negligent in kicking can in group of boys); Grant v. Mays, 129 S.E.2d 10 (Va. 1963) (child bicyclist not contributorily negligent in riding bicycle on busy highway).

24. *E.g.*, Chicago City Ry. v. Tuohy, 196 Ill. 410, 63 N.E. 997 (1902); Dixon v. Stringer, 277 Ky. 347, 126 S.W.2d 448 (1939); Burns v. Eminger, 81 Mont. 79, 261 Pac. 613 (1927); Dodd v. Spartanburg Ry. G. & E. Co., 95 S.C. 9, 78 S.E. 525 (1913); PROSSER § 31, at 128. While some jurisdictions adhering to the majority view (see note 21 *supra* and accompanying text) hold a very young child may be legally incapable of negligence, they prescribe no arbitrary age limit and apparently decide the question according to the peculiar facts of each case. *E.g.*, Gonzales v. Davis, 197 Cal. 256, 240 Pac. 16 (1925); Anthony v. Dutton, 73 Ga. App. 389, 36 S.E.2d 836 (1946); Nagy v. Balogh, 337 Mich. 691, 61 N.W.2d 47 (1953); Oviatt v. Camarra, 210 Ore. 445, 311 P.2d 746 (1957); Quattrochi v. Pittsburgh Rys., 309 Pa. 377, 164 Atl. 59 (1932).

25. Seabury v. Williams, 16 Ill. App. 2d 295, 300-01, 148 N.E.2d 49, 54 (1958); Stephens v. Stephens, 172 Ky. 780, 785, 189 S.W. 1143, 1145 (1916); Swoboda v. Nowak, 213 Mo. App. 452, 464, 255 S.W. 1079, 1082 (1923); Munden v. Harris, 153 Mo. App. 652, 663-64, 134 S.W. 1076, 1080 (1910); Williams v. Hays, 143 N.Y. 442, 446, 38 N.E. 449, 450 (1894); Bullock v. Babcock, 3 Wend. 391 (N.Y. 1829); RESTATEMENT, TORTS § 887, comment *a* (1939); PROSSER § 109, at 788. The passages cited in the above cases have reference to an infant's incapacity for malice and intent necessary for libel or slander. Since intent was

beneath the "age of reason" is said to be incapable of fault and thus relieved of all tort liability.[26] Whether a child has reached the age of reason is determined in each case by the judge's decision whether, considering the maturity of the child and the nature of the act in question, the child had sufficient discernment to be aware of his actions.[27] Thus there is no fixed age at which liability begins.[28]

In the area of unintended harms it is clear the Louisiana courts have adopted the view that a child of seven years or under is legally incapable of negligence.[29] A child above seven may be liable for negligence, but, as at common law, is held only to a standard of care appropriate to his age.[30] However, primarily because of a paucity of jurisprudence,[31] no such cer-

not a requisite for trespass at common law, infants have frequently been held liable for it and like torts. *E.g.*, Ellis v. D'Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (1953) (assault and battery; four years); Hutching v. Engel, 17 Wis. 237 (1863) (trespass; six years); Conklin v. Thompson, 29 Barb. 218 (N.Y. 1859) (trespass to chattels); Seaburg v. Williams, 16 Ill. App. 2d 295, 148 N.E.2d 49 (1958) (arson; six years). For an exhaustive discussion of the area see Bohlen, LIABILITY IN TORT OF INFANTS AND INSANE PERSONS, 23 MICH. L. REV. 9 (1924). The modern view is that intent is a requisite for torts akin to trespass, *e.g.*, for battery, intent to inflict harmful or offensive bodily contact. RESTATEMENT, TORTS §§ 13, 16 (1939); PROSSER § 9. It would thus seem an infant should be relieved of liability if too immature to possess such intent. See the *D'Angelo* and *Seaburg* cases, *supra*, in which infants were held liable for battery and arson respectively, but only after concluding they were old enough to entertain the required intent.

26. 1 MAZEAUD nos 409, 451, 455; 2 PLANIOL no. 879.

27. 1 MAZEAUD nos 451, 458-459; 2 PLANIOL no. 879. Mazeaud indicates the criterion is not so much the development of a moral conscience, but intelligence, discernment, and free will. 1 MAZEAUD nos 458-459.

28. 1 MAZEAUD no 451; 2 PLANIOL no. 879.

29. Jackson v. Jones, 224 La. 403, 69 So. 2d 729 (1953); Bodin v. Texas Co., 186 So. 390 (La. App. 1st Cir. 1939); Borman v. Lafargue, 183 So. 548 (La. App. 1st Cir. 1938). The Louisiana rule thus differs from the minority common law rule that a child *under* seven is incapable of negligence. See note 23 *supra* and accompanying text. Prior to *Jackson*, *Bodin*, and *Borman* the Louisiana rule seems to have been consonant with the minority common law position. See, *e.g.*, Shill v. New Orleans Public Service, 175 So. 113 (La. App. Orl. Cir. 1937); Dipino v. Joe Gulino & Son, 154 So. 772 (La. App. Orl. Cir. 1934); Bridwell v. Butler, 18 La. App. 675, 139 So. 51 (2d Cir. 1932).

30. *E.g.*, Jackson v. Jones, 224 La. 403, 69 So. 2d 729 (1953); Westerfield v. Levis, 43 La. Ann. 63, 9 So. 52 (1891); Cook v. Louisiana Public Utilities Co., 19 So. 2d 297 (La. App. 1st Cir. 1944); Kahn v. Shreveport Rys., 161 So. 636 (La. App. 2d Cir. 1935); Shalley v. New Orleans Public Service, 1 La. App. 770 (Orl. Cir. 1925).

31. The courts have several times announced the general rule that a minor is liable for his offenses and quasi-offenses, Smith v. Freeman, 31 So. 2d 524 (La. App. 2d Cir. 1947); Seither v. Poter, 194 So. 467 (La. App. Orl. Cir. 1940); Kern v. Knight, 13 La. App. 194, 127 So. 133 (1st Cir. 1930); Lutcher & Moore Cypress Co. v. Schexnaydre, 11 La. App. 72, 122 So. 911 (Orl. Cir. 1929), and two early cases held minors were liable for fraud just as adults, Christian v. Welch, 7 La. Ann. 533 (1852); Guidry v. Davis, 6 La. Ann. 90 (1851). However, apparently in none of these cases were the minors young enough to raise the question of their capacity for fault. Two cases involving bat-

tainty is possible as to intentional torts. In the only case in which the issue was clearly before the court, a child under four years was held incapable of fault in biting his nurse.[32] The court, however, evinced no intention of extending the seven-year age limit for negligence to intentional torts,[33] nor did it propound any general rule for determining the effect of age on liability for intentional torts.[34]

The instant case held that the petition did not state a cause of action because a child of six years is legally incapable of the fault alleged.[35] Though the court's rationale and exposition of authority was far from explicit, this conclusion was apparently reached by applying to an intentional tort the jurisprudential rule that a child of seven or under is incapable of negligence.[36] Such a step seems questionable on the basis of common sense and public policy. While there may be some basis for the position that a six-year-old is incapable of sufficient judgment to foresee the unintended consequences of his acts, it is not at all apparent that he is incapable of intending to do harmful acts.[37]

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teries by young children indicate some concessions will be granted children in determining whether their intentional conduct was tortious. Cornelius v. Montegut, 8 Orl. App. 358 (1911); Magavero v. Centano, 6 Orl. App. 394, 397-98 (La. App. Orl. Cir. 1909). In Mullins v. Blaise, 37 La. Ann. 92, 93 (1885), the court in dictum said fault might not be imputable to a child of six, but was unclear whether the child's act was negligent or intentional. See also Yancey v. Maestri, 155 So. 509 (La. App. Orl. Cir. 1934) (insane person not liable for offenses and quasi-offenses), where the court implies in dictum a child "of such tender age as to be incapable of distinguishing right from wrong" would not be liable. *Id.* at 517.

32. Johnson v. Butterworth, 180 La. 586, 157 So. 121 (1934).

33. The court only stated "the doctrine of contributory negligence does not apply to a child under four years of age." *Id.* at 590, 157 So. at 122. Thereafter, no reference was made to any form of the negligence rule.

34. Several times the court used such phrases as "a minor child too young to be deemed guilty of an offense of a quasi offense," *id.* at 592, 600, 613, 157 So. at 123, 125, 129, and "misdeeds of their children of tender years and 'lack of discernment.'" *Id.* at 608, 157 So. at 128. From this it might be inferred the court accepted the French "age of reason" rule, but there is no clear holding to this effect.

35. 154 So. 2d at 624.

36. The court stated: "[D]efendant's exceptions were based, primarily, upon the proposition that a child six years old cannot be deemed guilty of an *offense or quasi-offense.*" (Emphasis added.) *Id.* at 624. And later: "[D]efendants predicate their defense on the premise that: (1) A 6-year-old child is legally incapable of *negligence.*" *Ibid.* (Emphasis added.) After citing cases supporting the negligence rule the court, without further discussion, affirmed the dismissal. While it is possible the court treated the petition as alleging negligence on the child's part, this seems unlikely in light of plaintiff's allegation that the damage was "deliberately, wantonly and maliciously" inflicted. *Ibid.*

37. This distinction between negligent and intentional conduct of children has been specifically made in common law jurisdictions. *E.g.*, Ellis v. D'Angelo, 116 Cal. App. 2d 310, 316-17, 253 P.2d 675, 678-79 (1953); Seaburg v. Williams, 16 Ill. App. 2d 295, 299, 148 N.E.2d 49, 51 (1958). In both *Ellis* and *Seaburg*

Nor does it seem reasonable that a six-year-old lacks sufficient discernment to be aware of his transgression while deliberately damaging another's property.[38] Furthermore, the result of the court's approach seems inequitable: if the parent's personal fault cannot be established, an innocent third party is left without recompense for damages intentionally inflicted by conduct apparently substandard and inexcusable even in a six-year-old child. Such a result seems inconsistent with the policy apparently expressed in article 2318 and found desirable in many common law jurisdictions that the burden of depredatory acts of children should be incurred as a family risk by the child's parent. The desirability of furthering this policy by allowing recovery in situations like that in the instant case would seem to outweigh any administrative conveniences derived from extending to intentional torts the seven-year age limit for legal capacity for negligence.

The conclusion reached in the instant case amply illustrates the need for care not only in distinguishing the nature of the tortious conduct in question, but also in weighing countervailing policy considerations and recognizing available alternate paths. It seems that a more equitable and reasonable result could have been reached in the instant case by adopting either of the more flexible rules employed in France and at common law for deter-

children under seven were found to have had sufficient maturity to be liable for intentional torts. See note 24 *supra* and accompanying text.

38. In France it would be theoretically possible to find a child under seven has reached the age of reason and is liable for his delicts or intentional torts, since the determination is essentially factual. 1 MAZEAUD nos 451, 458-459. However, the French courts have apparently been reluctant to impose liability on children under nine or ten. Blanc-Jouvan, *La responsabilité de l'infans*, 55 REVUE TRIMESTRIELLE DE DROIT CIVIL 28, 37, 46 (1957). This should not prevent the Louisiana courts from applying the age of reason rule so as to achieve just results in situations like that in the instant case, in which the liability of the *parent* is in question. In France, since parental liability is predicated solely on the parent's fault, a child's capacity for fault only becomes an issue in a suit against a child. The French courts' application of the age of reason rule, then, apparently reflects a policy of protection of the child's interests. This policy would have no bearing on a suit against a *parent* in Louisiana and, furthermore, its application in such suits would seem to be in derogation of the policy represented in article 2318 that damages caused by children are a family responsibility. Also, application of the age of reason rule favorable to the plaintiff (or the adoption of the common law rule) would not materially endanger the child's interests since suit is seldom brought against a child due to the ease of recovery against the parent under the no fault liability provision of article 2318.

It is interesting to note the recent criticisms of the traditional French notion that fault is essentially a subjective determination, and arguments advanced in favor of a purely objective approach importing a tendency to disregard such subjective factors as lack of discernment or mental incapacity in fixing a defendant's liability and to place emphasis on providing relief to the injured party. See generally 1 MAZEAUD nos 456-468. This trend suggests that the present application of the age of reason rule in France may be short lived.

mining the liability of an infant for intentional harms.[39] With no Louisiana jurisprudence in direct conflict with either,[40] the court was free to choose. It is submitted that either the French "age of reason" rule or the common law rule that a child is liable for his intentional torts when he is mature enough to formulate the required intent should be introduced into Louisiana law.

George A. Kimball, Jr.

39. A similar result could have been achieved by accepting the "presumed fault" interpretation of article 2318, under which the child's lack of maturity would have no direct bearing on the parent's liability (see note 15 *supra*), but this approach would run afoul of article 237, the *Butterworth* case, and other holdings that there is no parental liability without fault of the child. See notes 16-18 *supra* and accompanying text.

40. See notes 29-32 *supra* and accompanying text.